UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1999/18
3 June 1999

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Fifty-first session
Item 7 of the provisional agenda

# HUMAN RIGHTS OF INDIGENOUS PEOPLES

## Indigenous people and their relationship to land

Second progress report on the working paper prepared by
Mrs. Erica-Irene A. Daes, Special Rapporteur

GE.99-13636 (E)

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## Preface

This second progress report is submitted in the form of a revised preliminary working paper, prepared on the basis of the preliminary working paper (E/CN.4/Sub.2/1997/17) of 20 June 1997, and the suggestions and information received from Governments, indigenous peoples, intergovernmental organizations and non-governmental organizations.

The suggestions, corrections, data and other useful information provided last year by the Governments of Australia, Canada, Denmark, and New Zealand have been gratefully received and have been included in or taken into consideration in the preparation of the present report. They have contributed substantially to the improvement of the preliminary working paper.

The Special Rapporteur expresses deep regret that no comment, recommendation or other submission has been received during the past year from any Government, and only a few submissions have been received from indigenous peoples. The submissions that have been received are noted in paragraph 6 of the revised text below. Because so few submissions have been received, the Special Rapporteur believes that additional time should be given so that Governments and others may provide their updated views and additional useful materials for the completion of the working paper.

The Special Rapporteur again recommends and requests warmly that this second progress report on the working paper be circulated to Governments, indigenous peoples, intergovernmental organizations and non-governmental organizations, requesting suggestions, comments, corrections and additional information relevant to the working paper, and recommends that a final working paper be prepared, on the basis of this second progress report on the working paper and the information to be received from Governments and others, for submission to the Sub-Commission at its fifty-second session, in 2000.

## INTRODUCTION

1. In its decision 1997/114 of 11 April 1997, the Commission on Human Rights, at its fifty-third session, taking note of resolution 1996/38 of 29 August 1996 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities approved the appointment of Mrs. Erica-Irene A. Daes as Special Rapporteur to prepare a working paper on indigenous people and their relationship to land with a view to suggesting practical measures to address ongoing problems in that regard.

2. In accordance with this decision, and on the basis of her previous working paper (E/CN.4/Sub.2/1996/40), the Special Rapporteur prepared a preliminary working paper (E/CN.4/Sub.2/1997/17 and Corr.1) examining the problems which exist regarding indigenous land issues, with a view to contributing to increased understanding between indigenous peoples and States concerning land issues, providing information and analysis that could contribute to the just resolution of these issues, and with the hope of facilitating understanding of the provisions relevant to land rights contained in the draft United Nations declaration on the rights of indigenous peoples (Sub-Commission resolution 1994/45, annex). Attention was given to identifying and examining practical measures to address ongoing problems relating to indigenous peoples and land.

3. In its resolution 1997/12, the Sub-Commission, at its forty-ninth session, requested the Secretary-General to transmit the preliminary working paper to Governments, indigenous peoples and intergovernmental and non-governmental organizations, as soon as possible, for their comments and suggestions and requested the Special Rapporteur to prepare her final working paper on the basis of comments and information received from Governments, indigenous peoples and others and to submit it to the Working Group on Indigenous Populations at its sixteenth session and to the Sub-Commission at its fiftieth session. In March 1998, the Secretariat solicited comments and suggestions from governments, indigenous peoples and others.

4. Owing perhaps to the shortness of time, few responses, comments or other submissions were received. Only four States responded. They provided excellent and very helpful information, analysis and criticism of the preliminary working paper. Eleven indigenous peoples' organizations or organizations associated with indigenous peoples responded, some with extensive and useful information. Because so few replies were received and because those responses were received at a late date, it was impossible to prepare the final working paper based upon the comments and suggestions received.

5. The Special Rapporteur submitted a progress report on the working paper to the Sub-Commission at its fiftieth session (E/CN.4/Sub.2/1998/15), in which she particularly requested that States provide information and analysis concerning the interests and needs of States in relation to the subject of indigenous land rights, and she encouraged States, indigenous peoples and others to submit further information relevant to the working paper. In its resolution 1998/21, the Sub-Commission requested the Secretary-General to transmit the progress report to Governments, indigenous peoples, intergovernmental and non-governmental organizations for their comments, data

and suggestions, and requested the Special Rapporteur to prepare her final working paper on the basis of the comments and information received. Under cover of a letter dated 4 November 1998, the progress report was transmitted and comments, data and suggestions were requested.

6. As of the time of writing, no States have responded to this request. The following individuals and entities have submitted statements or information:

Patrick J. Augustine, Address to the New Brunswick Commission on Aboriginal Issues;

The Association of Norfolk Islanders;

Asamblea Naciónal Indígena Plural por la Autonomía;

Pax Christi International;

National Liberation Front of Twipra;

Karel Worami, West Papua Interest Association;

Sovereign Dineh Nation;

Comisión Jurídica para el Autodesarrollo de los Pueblos;

Origínarios Andinos.

The Special Rapporteur expresses her sincere appreciation to all of those States, indigenous peoples and intergovernmental and non-governmental organizations that have submitted information and suggestions relevant to the working paper in response to this and earlier requests for information.

7. Reports and statements by indigenous peoples from all parts of the world during sessions of the Working Group on Indigenous Populations and information received in the preparation of this working paper have made it clear that land and resource issues, particularly the dispossession of indigenous peoples from their lands, are issues of the most urgent and fundamental nature. At the same time, there has been great concern on the part of certain States, academic institutions, non-governmental organizations (NGOs) and individuals that the recognition of the human rights of indigenous peoples would supposedly require that all the lands and resources ever taken from indigenous peoples be returned. Because of the diversity of their history and of the political relationships and developments relating to the many indigenous peoples worldwide, and the diverse past and present legal issues, such matters will have to be reviewed on a case-by-case basis, if possible, by both indigenous peoples and States to resolve the issues of the land rights of indigenous peoples. This matter is addressed in section III below.

8. There are an enormous number of problems and issues relating to indigenous land rights, so many that no study or paper could give them all full consideration within the time-frame allowed for this initiative. Any attempt to deal with all of the land and resource issues would necessarily be superficial and lengthy. The better course, adopted here, is to sort and

organize the multitude of issues into an analytical framework and to attempt to identify those issues or problems which are the most fundamental or most severe and, of these, which are the most deserving of attention in the search for means of alleviating the suffering and injustices endured by indigenous peoples.

9. What core values should guide our judgement in this work? First, the great human rights principles embodied in the Universal Declaration of Human Rights and the International Covenants on Human Rights, particularly the prohibition of discrimination and the principles of equality and self-determination. In addition, we must be guided by the fundamental values and interests that form the foundation of the draft United Nations declaration on the rights of indigenous peoples: among others, the preservation and well-being of indigenous cultures and communities, the elimination of poverty and deprivation among indigenous peoples, and the great goals of equality before the law and justice for indigenous peoples and all peoples. The relevant portions of the Universal Declaration, the International Covenant on Civil and Political Rights, the International Labour Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, and other legal instruments and bodies of human rights standards are set out in the annex to the present progress report. The Special Rapporteur also calls attention to concerns expressed in the preambular paragraphs of Sub-Commission resolution 1998/21, in which the Special Rapporteur was requested to prepare the present progress report. 1/ It is in this context that the members of the Sub-Commission, of the Commission on Human Rights and of other United Nations bodies, specialized agencies, States, indigenous peoples, academic institutions, non-governmental organizations and individuals concerned are requested to read, consider and comment upon this progress report on the working paper.

## I. RELATIONSHIP OF INDIGENOUS PEOPLES TO THEIR LANDS, TERRITORIES AND RESOURCES

10. Throughout the life of the Working Group, indigenous peoples have emphasized the fundamental issue of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. Indigenous peoples have explained that, because of the profound relationship that indigenous peoples have to their lands, territories and resources, there is a need for a different conceptual framework to understand this relationship and a need for recognition of the cultural differences that exist. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.

11. It must be noted that, as indigenous peoples have explained, it is difficult to separate one indigenous concept from another. This is especially true when trying to describe indigenous peoples' relationship with their lands, territories and resources. The relationship with the land and all living things is at the core of indigenous societies. For example, the land tenure system, known as Kipat, of the Limbu indigenous people of Nepal provides a means of belonging to a place and to a distinctive community - the

one not separable from the other. Kipat defines them as a "tribe". 2/ According to one authority, Kipat "is fused with and articulates the culture and any assault on Kipat is seen as a threat to the very existence of the Limbu as a separate community within the society". 3/ Professor Robert A. Williams, in the context of the discussion about the territorial rights of indigenous peoples in the Working Group on Indigenous Populations, stated that "indigenous peoples have emphasized that the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories". 4/

12. Professor James sake Henderson attempts to illustrate this distinct relationship and conceptual framework by stating that "the Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource ... Their vision is of different realms enfolded into a sacred space ... It is fundamental to their identity, personality and humanity ... [the] notion of self does not end with their flesh, but continues with the reach of their senses into the land". 5/ Such a relationship manifests itself in the elements of indigenous peoples' cultures, such as language. For example, an Inuit elder tried to articulate this relationship by stating that "our language contains an intricate knowledge of the Arctic that we have seen no others demonstrate". 6/

13. For a number of different reasons, the international community has begun to respond to indigenous peoples in the context of a new philosophy and world perspective with respect to land, territory and resources. New standards are being devised based, in part, upon the values that have been expressed by indigenous peoples and which are consistent with indigenous peoples' perspectives and philosophies about their relationships to their lands, territories and resources.

14. Policy and direction within the Sub-Commission and other United Nation bodies in regard to the relationship of indigenous peoples with their lands, territories and resources have been shaped by the conclusions, proposals and recommendations of Special Rapporteur José R. Martínez Cobo, in volume V of the Study of the Problem of Discrimination Against Indigenous Populations. 7/ They generally reflect indigenous peoples' articulation of this distinct relationship. Mr. Martínez Cobo states:

> "It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.
>
> "For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely." 8/

15. Further examples of the recognition of this special relationship include the specific reference to "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and

in particular the collective aspects of this relationship", in article 13 of the International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.

16. The distinctive nature of indigenous peoples' relationship to lands is also referred to in the draft United Nations declaration on the rights of indigenous peoples, in both preambular and operative paragraphs. In particular, article 25 states:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard."

17. Finally, the proposed American Declaration on the Rights of Indigenous Peoples, drafted by the Inter-American Commission on Human Rights 9/ and now under consideration by the Permanent Council of the Organization of American States, contains the following preambular language:

> "[The States,]
>
> "Recognizing the respect for the environment accorded by the cultures of indigenous peoples of the Americas, and considering the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live and their natural resources.
>
> ...
>
> "Recognizing that in many indigenous cultures, traditional collective systems for control and use of land and territory and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being ..."

18. In summary, each of these examples underscores a number of elements that are unique to indigenous peoples: (i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability. There may be additional elements relating to indigenous peoples and their relationship to their lands, territories and resources which have not been captured by these examples.

## II. HISTORY AND BACKGROUND: IMPACT OF THE DOCTRINES OF DISPOSSESSION

19. The gradual deterioration of indigenous societies can be traced to the non-recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other fundamental human rights. The natural order of life for indigenous

peoples has been and continues to be threatened by a different order, one which is no longer dictated by the natural environment and the indigenous peoples' relationship to it. Indigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources.

20. The colonization of indigenous territories has affected indigenous peoples in a number of ways. Demographic deterioration occurred through maltreatment, enslavement, suicide, punishment for resistance, warfare, malnutrition due to destruction of the natural environment or over-exploitation of natural resources, disease and outright extermination. Rodolfo Stavenhagen states that "the entire population of the Americas decreased by 95 per cent in the century and a half following the first encounter". 10/ The intent to convert indigenous peoples to Christianity and bring them under the "sovereignty" of foreign monarchs created widespread havoc, despite some early attempts at "friendly treatment". With population decline came the destruction of the traditional social order, due to the efforts of missionaries and Western attitudes towards the divisions of labour and of gender, among others. The introduction of the practice of attaching a monetary value to things and of buying and selling things previously considered non-merchantable, including land, added the stress of an economic environment quite opposite to the traditional economic order of most indigenous communities. These concepts were all alien to the collective social organization of indigenous communities.

21. The factual accounts relating to the dispossession and expropriation of indigenous peoples' lands are too varied, detailed and extensive to examine in this working paper. There is much to be learned from indigenous peoples worldwide about the methods and legal doctrines used to dispossess them. At present, however, it is of critical importance to underscore the cultural biases that contributed to the conceptual framework constructed to legitimize colonization and the various methods used to dispossess indigenous peoples and expropriate their lands, territories and resources. It is safe to say that the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of States. 11/

22. The early theorists who espoused a "naturalist" framework were the first to tackle the difficult question of the place of indigenous peoples within modern international law and, in particular, indigenous peoples as rightful owners of their lands, territories and resources. "Naturalist" constructions were founded upon the notion of a higher authority and divine reason, and rooted in morality. An important feature of the "naturalist" view was the principle of the equality of all human beings. This principle had an important place in the articulation of the application of natural law to the "Indians" of the New World.

23. Early naturalists actually advocated on behalf of the Indians against imperial and papal authority with regard to the assertions of Spanish ownership, use and exploitation of Indian lands and resources, which were based upon the doctrines of conquest and discovery. They argued that Indian peoples did in fact have rights to the land, and some went one step further by

addressing, in the context of the laws of war, the rights and capacity of Indian nations and peoples to enter into treaty relations although they were "strangers to the true religion". In their construction, if Indian peoples were in fact human beings and equal, they would have "just cause" to wage war against the invaders. However, unless conquest followed a just war, Indians could not unilaterally be dispossessed of their lands or deprived of their autonomous existence.

24. Such prescriptions for the European encounters with indigenous peoples were building blocks for a system of principles and rules governing encounters among all peoples of the world. Subsequent theorists continued during the early nineteenth century to include non-European aboriginal peoples among the subjects of what came to be known as the "law of nations" and later, "international law".

25. Hence, early theorists did address the question of the rights of Indian peoples in the framework of natural law, albeit without their participation or knowledge. Nonetheless, such theorists believed that natural law had the capacity to respond to the rights and interests of the indigenous peoples of the Americas. Whatever protection the early law of nations afforded indigenous peoples, it was not enough to stop the forces of colonization and empire as they extended throughout the globe. Theorists eventually modified the law of nations to reflect, and hence legitimize, a state of affairs that subjugated indigenous peoples. International law remains primarily concerned with the rights and duties of European and similarly "civilized" States and has its source principally in the positive, consensual acts of those States.

26. Unfortunately, established Christian and other religious values became embedded in natural law and international law, undercutting any possibility for indigenous peoples' claims, rights and values to be advanced in the years following invasion. Indigenous peoples were commonly labelled "infidels" and "pagans" in natural law discourse. Discriminatory and racist attitudes are apparent in the terminology alone. Although natural law may have been more expansive in some respects, a very narrow concept began to emerge when the colonizing countries furthered their adventures into the Americas and elsewhere. Their perspectives and values began to subsume indigenous nations and peoples.

27. In most situations, it was only through rationalization and military domination that colonizers secured "ownership" of the lands, territories and resources of indigenous peoples. The territories of indigenous peoples in the Americas and elsewhere were taken through many means, but largely by military force. Where "just war" could not be waged, treaties sometimes were concluded. In regard to North America, Vine Deloria, Jr. wrote:

> "Treaty-making was a feasible method of gaining a foothold on the continent without alarming the natives. Treating with the Indians, then, brought an air of civility and legitimacy to the white settlers' relations with the Indians and provoked no immediate retaliation by the tribes. Instead of the Indians being subjected to bondage or their lands merely seized through the use of force, which Spain eventually did, civility reigned in North America. Indian land and the rights to live in certain areas were purchased at formal treaty sessions." 12/

28. What territory remained was diminished further by forcible or coerced removal, relocation and allotment. Many indigenous communities in North America were forced onto reservations. The severing of indigenous peoples from their lands and territories and the failure by States to recognize the social, cultural, spiritual and economic significance of land to indigenous peoples had both short- and long-term impacts on indigenous communities.

29. The doctrines of dispossession which emerged in the subsequent development of modern international law, particularly conquest, discovery and terra nullius, have all had untold adverse effects on indigenous peoples. Only recently has the international community begun to understand that such doctrines are illegitimate and racist. For example, while the Permanent Court of International Justice based its decision in the Eastern Greenland case of 1933 13/ upon the same framework and attitudes, in 1975 the International Court of Justice ruled that the doctrine of terra nullius had been erroneously and invalidly applied against the tribal peoples of the Western Sahara. 14/

30. The High Court of Australia in its 1992 decision in Mabo v. Queensland discussed the legal and other effects of the doctrine of terra nullius. The Court denounced the doctrine by concluding that this "unjust and discriminatory doctrine ... can no longer be accepted". This decision gave rise to the Native Title Act, adopted by the Government of Australia in 1993, which established a framework and mechanism by which Aboriginal peoples in Australia could secure land rights. However, Australian Aboriginal peoples have reported to the Working Group that they have great difficulties with the Act, and regard as unjust and ill-founded the State's asserted authority, recognized in the Mabo decision, to extinguish indigenous land rights. 15/ To what extent the Government of Australia can continue to extinguish indigenous land title through legislation that discriminates against indigenous title is a matter of ongoing debate. The Committee on the Elimination of Racial Discrimination, on 18 March 1999, issued a decision finding that provisions in the 1998 Native Title Act Amendments extinguish or impair the exercise of indigenous title rights and interests and discriminate against native title holders (CERD/C/54/Misc.40/Rev.2). This case is discussed further in paragraphs 44, 62 and 86 below. It demonstrates that Eurocentrist and discriminatory ideas continue to be evident in legal theory and action and that such attitudes in national legislation and court decisions may trap indigenous peoples in a legal discourse that does not embrace their distinct cultural values, beliefs, institutions or perspectives. 16/

## III. FRAMEWORK FOR THE ANALYSIS OF CONTEMPORARY PROBLEMS REGARDING INDIGENOUS LAND RIGHTS

31. The principal problems that will be explored in this working paper are numerous and diverse. These problems may be organized into an analytical framework that will help to clarify them and identify possible solutions. This analytical framework follows.

## A. Failure of States to acknowledge indigenous rights to lands, territories and resources

32. This most fundamental and widespread problem is divided into two parts: the failure of States to recognize the existence of indigenous use, occupancy and ownership, and the failure of States to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land.

### 1. Failure to recognize the existence of indigenous use, occupancy and ownership

33. Countries in many parts of the world are unaware of or ignore the fact that communities, tribes or nations of indigenous peoples inhabit and use areas of land and sea and have done so, in many cases, since time immemorial. These areas are typically far from the capitals and other urban areas of the country and typically countries regard these lands and resources as public or government lands. Although the indigenous people concerned regard themselves, with good reason, as owning the land and resources they occupy and use, the country itself, typically, disposes of the land and resources as if the indigenous people were not there. 17/ In Belize, for example, 17 logging concessions were recently granted by the Government to foreign companies to cut timber in forests where Maya people have always lived and have relied on the forest for their subsistence. The San or Bushmen in certain African countries face, among other land problems, grave difficulties because of the lack of national legislation safeguarding their land use and tenure. 18/ In West Papua New Guinea (West Irian), the Government of Indonesia encouraged transmigration and settlement on lands where indigenous peoples have lived. 19/ This process has reportedly caused widespread dislocation of indigenous peoples, practically forcing many to live in other countries. In the words of one authority, "the indigenous peoples of the Philippines are squatters on their own lands", because the Philippine State claims ownership of some 62 per cent of the country's territory. 20/ Similar situations are reported in Indonesia, Thailand and India, and most African countries are reported to claim all forest lands. 21/ In Nicaragua, the Government planned an environmental preserve or park in complete disregard of the indigenous population living on that land. The Martínez Cobo study found that many countries with large indigenous populations nevertheless reported that no such peoples existed there. Although this situation has improved, the problem appears to continue.

### 2. The failure of States to accord appropriate legal status, appropriate juridical capacity and other legal rights

34. This problem is closely related to the one discussed above. Although States know that indigenous communities, nations or groups exist and have exclusive use and occupancy of an area, some States do not acknowledge that the indigenous peoples concerned have legal entitlement or rights to the land or resources. In some situations, the indigenous peoples are regarded as using the public or national lands at the sufferance of the Government.

35. The concept of aboriginal title and the relationship of this legal concept to the human rights of indigenous peoples is centrally important. In

many countries, particularly those of the British Commonwealth, exclusive use and occupancy of land from time immemorial gives rise to aboriginal title, a title that is good against all but the Sovereign, that is, the Government of the State. 22/ Where aboriginal title is recognized, indigenous peoples have at least some legal right that can be asserted in the domestic legal system. However, aboriginal title is often subject to the illegitimate assumption of State power to extinguish such title, in contrast to the legal protection and rights that, in most countries, protect the land and property of citizens (discussed further in paragraphs 32 to 37 below). This single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples.

36. Aboriginal title or the title of indigenous peoples is also, in many countries, more limited in its legal character and the rights that appertain to it and more limited in the legal protection accorded to that title as compared to other land titles. For example, in Canada, the Supreme Court of Canada gave extensive consideration to the question of aboriginal title in an unpublished 1997 decision, Delgamuukw v. The Queen, of 11 December 1997. In this decision, the Chief Justice makes clear that aboriginal title to land in Canada is a distinct and clearly inferior right as compared to ordinary fee simple title. Aboriginal title is described as a "burden" on the underlying title of the Crown. It is a title that cannot be alienated except to the Crown. It is merely a right to use and occupy the land, and an important limit is placed by the Supreme Court on the use of the land. The land cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to that land. For example, land used as a hunting ground cannot be used so as to destroy its value as a hunting ground. Fair compensation is required for infringements of aboriginal title, but no clear principles for compensation were established in the decision. 23/

37. In some countries, indigenous communities do not have the legal capacity to own land, or do not have the capacity to own land collectively. Where the indigenous people or group is not recognized as having juridical status or existence, it cannot hold title to lands or resources nor take legal action to protect those property interests. Many States that a generation ago denied such legal capacity to indigenous peoples have now made positive reforms, but further study of this problem is called for.

### B. Discriminatory laws and policies affecting indigenous peoples in relation to their lands

38. In those States that have developed a body of positive law and a body of jurisprudence in regard to indigenous peoples - and their number is increasing - the most significant problems appear to arise because of persistent discriminatory laws and legal doctrines that are applied to indigenous peoples and their lands and resources. 24/ The concept of aboriginal title, as discussed above, is itself discriminatory in that it provides only defective, vulnerable and inferior legal status for indigenous land and resource ownership. 25/ These discriminatory laws and legal doctrines deserve special attention because they appear to be so widespread, because they appear to be in violation of existing international human rights norms and because they appear to be relatively amenable to correction.

1. Laws regarding the extinguishment of indigenous peoples' land and resource rights 26/

39. Practically all countries where indigenous peoples live assert the power to "extinguish" the land titles and rights of the indigenous peoples within their borders, without the consent of the indigenous peoples. The concept of extinguishment includes voluntary purchase and sale of title, but more commonly the term "extinguishment" is used to mean outright taking or expropriation, most often without just compensation. Like the concept of aboriginal title, extinguishment is a term that came into prominent use during the colonial period. 27/

40. The problem of extinguishment is related to the concept of aboriginal title. The central defect of so-called aboriginal title is that it is, by definition, title that can be taken at will by the Sovereign - that is, by the colonial Government, or nowadays, by the State. Like aboriginal title, the practice of involuntary extinguishment of indigenous land rights is a relic of the colonial period. It appears that, in modern times, the practice of involuntary extinguishment of land titles without compensation is applied only to indigenous peoples. As such, it is discriminatory and unjust, to say the least, and deserving of close examination.

41. One particularly clear example of the problem of extinguishment is provided by the case of the Tee-Hit-Ton Indians v. United States. 28/ In this case the Supreme Court decided that the United States may (with limited exceptions) take or confiscate the land or property of an Indian tribe without due process of law and without paying just compensation, this despite the fact that the United States Constitution explicitly provides that the Government may not take property without due process of law and just compensation. The Supreme Court found that property held by aboriginal title, as most Indian land is, is not entitled to the constitutional protection that is accorded all other property. The racially discriminatory nature of the Tee-Hit-Ton decision can be seen in the opinion, an extract of which follows:

> "No case in this court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.
>
> "... Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."

42. The legal doctrine created by this case continues to be the governing law on this matter in the United States today. 29/ The racially discriminatory character of the decision has not prevented this doctrine from being freely used by the courts and by the United States Congress in

legislation, even in recent years. Indeed the Congress relied on this doctrine in 1971 when it extinguished all the land rights and claims of practically every one of the 226 indigenous nations and tribes in Alaska by adopting the Alaska Native Claims Settlement Act. The Act provided for transferring the land to profit-making corporations that were required to be created by the indigenous peoples and for paying a sum of money to each native corporation - a sum far less than the value of the land. The Alaska native tribes themselves were paid nothing. The remaining lands of the territory that belonged to the tribes, or that had been claimed by them, were turned over to the State of Alaska and the United States. The Alaska native tribes never consented to the legislation. Because of the concepts of aboriginal title and extinguishment, and because of the related discriminatory legal doctrines (which are discussed further below), it was understood that the lands of these indigenous peoples could be taken outright, without payment or just compensation. 30/

43. Indigenous representatives and experts have reported that many other countries have laws and policies similar to those of the United States in this regard. Canada, for example, established this doctrine in 1888, 31/ but the Constitution Act of 1982, section 35 (1), recognizes and affirms aboriginal and treaty rights. By reason of the Constitution Act of 1982, courts in Canada no longer acknowledge government power to "extinguish" aboriginal rights. Instead, the courts have decided that aboriginal rights, including aboriginal land title, are not absolute but may be "infringed" by the federal or provincial governments when the infringement is "justified" by the needs of the larger society. In a recent case, Chief Justice Lamer of the Supreme Court of Canada wrote: "In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title." (Delgamuukw v. The Queen, paragraph 165 of the Chief Justice's opinion, unpublished decision, 11 December 1997). It remains unclear whether this new requirement of "justification" will in fact provide greater protection to indigenous land rights than previous law. As noted above, it also remains doubtful whether the law accords an equal, non-discriminatory level of legal protection to indigenous property rights as compared to the property rights of others.

44. As discussed above, the High Court of Australia, in Mabo v. Queensland, ruled that the doctrine of terra nullius may not be applied to deny indigenous rights to land, but nonetheless confirmed the power of the Sovereign to extinguish native title. 32/ The Court held that native title may be extinguished, but only by legislation, by the alienation of land by the Crown or by the appropriation of the land by the Crown in a manner inconsistent with the continuation of native title. The Native Title Amendment Act, enacted in 1998, provided a number of means whereby native or indigenous title would be extinguished. The Act has been attacked as discriminatory in several respects: the amendments prefer the rights of non-native title holders over those of native title holders; they fail to provide native title holders with protection of the kind given to other landowners; they allow for discriminatory action by governments; they place barriers to the protection

and recognition of native title; and they fail to provide for appropriately different treatment of unique aspects of Aboriginal culture. 33/ The Committee on the Elimination of Racial Discrimination has found various provisions of the Act discriminatory:

> "7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and the restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses." 34/

The Committee found that the amended Act cannot be considered to be a special measure within the meaning of articles 1.4 and 2.2 of the Convention and expressed its concerns about Australia's compliance with articles 2 and 5 of the Convention.

2. Plenary power

45. Another discriminatory legal doctrine that appears to be widespread is the doctrine that States have practically unlimited power to control or regulate the use of indigenous lands, without regard for constitutional limits on governmental power that would otherwise be applicable. In the United States, this is known as the "plenary power doctrine" and it holds that the United States Congress may exercise virtually unlimited power over indigenous nations and tribes and their property. No other population or group is subject to such limitless and potentially abusive governmental power.

3. Treaty abrogation and land rights

46. Another example of discriminatory legal doctrines is the law in regard to treaties made with indigenous peoples. Treaties have been used, among other purposes, as mechanisms for gaining cessions of indigenous land and for ostensibly guaranteeing rights to the remaining lands held by the indigenous nation. The problem of discrimination arises when the State later abrogates or violates the treaty. In the typical case, the injured indigenous nation or tribe has no legal remedy against the State either in domestic law or under international law. The denial of any remedy under international law is inconsistent with the use of treaties as a legal mechanism and with the status of indigenous peoples as subjects of international law. Thus, indigenous peoples appear to be unique in being denied legal remedies for violation of their rights, where the State abrogates or violates a treaty between the State and an indigenous nation, tribe or peoples. Certain States, including New Zealand and the United States, regard treaties as instruments of domestic law as well as international law and accordingly do not believe a remedy under international law is necessarily appropriate. The question, in such cases remains whether a just remedy is provided for treaty violation or abrogation, and whether the use of the treaty mechanism in domestic law is non-discriminatory.

## C. Failure to demarcate

47. In terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands. 35/ Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked.

48. Some States, such as Brazil, have strong and very positive laws requiring demarcation of indigenous lands. Others, perhaps the majority, have no such laws. In States with laws requiring demarcation, the implementation and execution of those laws have been weak or absent. Where such laws are lacking or weak, problems arise because, not having demarcated indigenous land, the State cannot identify what is indigenous land and what is not. As a result there are conflicts with indigenous communities. Nicaragua and Belize present examples of this kind of situation.

49. An important case now before the Inter-American Court of Human Rights raises the issues of States' obligations to recognize and respect the lands, resources and territories of indigenous peoples, and States' obligations to demarcate those lands and territories. The case is that of the Mayagna indigenous community of Awas Tingni against Nicaragua; it was filed with the Court by the Inter-American Commission on Human Rights in June 1998. 36/

50. The complaint is based on a petition filed by the community of Awas Tingni with the Inter-American Commission. The community of Awas Tingni alleged that the Government of Nicaragua had not met its legal obligations under the Nicaraguan Constitution and international law by failing to recognize and safeguard the community's rights to the lands that its members have traditionally occupied and used. Despite various efforts by the community of Awas Tingni to formally demarcate or achieve other specific legal recognition of its traditional lands, the community's use and occupancy of those lands became increasingly threatened. Rather than respond to Awas Tingni's requests that its land rights be respected, and without consulting with Awas Tingni, the Government of Nicaragua granted a concession to a Korean timber company to log lands (nearly 65,000 hectares) traditionally held by Awas Tingni.

51. The case before the Court asserts, among other things, that Nicaragua has a legal obligation to demarcate and respect the traditional lands of Awas Tingni by reason of article 21 of the American Convention on Human Rights ("Everyone has the right to the use and enjoyment of his property ...") and article 27 of the International Covenant on Civil and Political Rights, which provides: "In those States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Nicaragua is a party to both the Convention and the Covenant. It is argued, with considerable authority, that traditional indigenous land tenure systems and patterns of land use are an aspect of culture that is protected by

article 27 of the Covenant. This case is the first to raise indigenous land rights issues and the obligations of States to respect these rights. The decision of the Inter-American Court may have a far-reaching impact in determining the present scope of international legal obligations to respect and demarcate indigenous lands and resources under the American Convention and the International Covenant on Civil and Political Rights.

### D. Failure of States to enforce or implement laws protecting indigenous lands

52. Some of the most grave situations, such as the massive invasion of Yanomami lands in Brazil and the resulting deaths of thousands of Yanomami Indians, came about in large part because of the State's failure to enforce existing laws. Even after demarcation of the Yanomami territory, the Government of Brazil has not devoted the resources necessary to prevent the illegal invasion of thousands of gold miners. Gold miners have recently been responsible in part for the unprecedented fires that have burned extensively within the Yanomami territory, destroying vast areas of forest and food crops. The fires caused widespread outbreaks of disease that resulted in the deaths of more than 100 Yanomami in 1998. 37/ In other situations, indigenous peoples find they cannot protect their rights to lands and resources because they do not have effective recourse to the courts or other legal remedies. In the worst situations, violence, intimidation and corruption prevent effective legal action by or on behalf of indigenous peoples. This was reported, for example, concerning efforts by Macuxi Indian communities in Brazil to protect their lands. In December 1998, the Government of Brazil took a positive step towards remedying the situation by issuing a decision to proceed with demarcation of the Raposa/Serra do Sul area in the northern state of Roraima. The area is home to the Macuxi, Wapixana, Ingariko and Taurepang Indian peoples. Previously, the Inter-American Commission on Human Rights of the Organization of American States had visited the area and formally recommended that the Government of Brazil take steps to demarcate the Raposa/Serra do Sul area. 38/ However, in the months following the Government's decision there have been widespread reports of an increase in acts of physical and political intimidation by gold miners and agriculturalists living in the area. Official demarcation of the Raposa/Serra do Sul area still awaits ratification by the President of Brazil and there is still a considerable possibility that the area will be further reduced before demarcation begins. 39/ In other settings, in various countries, there is sometimes no effective legal system to provide a remedy, or indigenous peoples cannot afford to pay for necessary professional legal representation, or they cannot use the language required by the courts or legal agencies, or they cannot travel to the courts or legal agencies, or they simply do not know that legal remedies may be available. As with other human rights, the poverty, geographical remoteness and cultural and linguistic differences of indigenous peoples create severe impediments to the protection of their land, territorial and resource rights.

### E. Problems in regard to land claims and return of lands

53. The long and painful history of the unjust and inhuman dispossession of indigenous peoples from their territories has resulted in many indigenous peoples having no land or resources or too little land and resources to sustain their communities and their cultures. This is by no means universally

true, but for many indigenous peoples, their future will depend on acquiring the lands and resources needed for sustainable economic development and for a degree of self-sufficiency. The most severe problems exist in countries where there are no legal remedies and no legal or political mechanisms for addressing or resolving indigenous land claims. It is reported that in Nepal, for example, no such remedies or mechanisms are available to indigenous peoples, who have lost practically all their lands and resources. 40/

54. Positive and successful measures relating to claims for land and return of land are dealt with in section IV below. The present discussion addresses the problems, some of them quite severe, that have been created by some claim and negotiation procedures and land return measures. 41/

55. A particular problem that has been repeatedly brought to the attention of the Commission on Human Rights and the Sub-Commission is the use or misuse of claim procedures to deprive indigenous peoples of their rights, or their claimed rights to land and resources. Numerous such problems have been reported by indigenous peoples in many countries. The problems may be summarized as follows: in some cases, an unauthorized or mistaken claim is made to a court or administrative body that the State has taken or paid an unfairly low price for an area of land originally owned by an indigenous people, whereas in fact, the land has not in fact been taken but is still owned by the indigenous people. In other cases, the land has been taken but the indigenous people concerned does not want compensation but return of the land. These fraudulent or mistaken claims are sometimes, in effect, encouraged by legal provisions that permit a lawyer to earn a fee of as much as 10 per cent of the money award recovered. When such claims are taken to conclusion and an award of compensation is made, the payment of the award effectively extinguishes the indigenous title to the land in question. This has occurred even in situations where the Indian nation or tribe is still in possession of the land. Thus, these "claims" processes are depriving Indians of their lands.

56. The problems created by fraudulent and improper claims are aggravated by the lack of proper legal procedures in the claim process. Processes such as that of the now defunct Indian Claims Commission in the United States did not ensure that claimants had proper authority to act for the tribe concerned. Procedures did not give the tribes concerned proper notice or an opportunity to be heard. The Commission in more than one case permitted lawyers to act in direct opposition to their supposed or nominal client tribes and even permitted lawyers to carry on money compensation claims after the claimant tribes had dismissed the lawyers in an effort to stop the claims.

57. Although the Indian Claims Commission no longer exists, the cases that it handled and the problems it created continue. Some notable cases that remain unresolved are the Black Hills claim (in which the Sioux tribes have refused to accept the compensation awarded and seek a return of portions of the land) and the Western Shoshone case (in which the Western Shoshone tribes also refuse payment and seek a restoration of some of the land). In the latter case, some Western Shoshones have remained in possession of certain areas of the land supposedly taken by the United States and are resisting Government efforts to interfere with their use of the land. The extensive and

disruptive problems relating to the Indian Claims Commission have been given scholarly attention. 42/ These problems have also been the subject of complaints to the United Nations and other bodies. 43/

58. Many of the problems discussed in the preceding paragraphs have been raised in a formal human rights complaint filed with the Inter-American Commission on Human Rights of the Organization of American States by two Western Shoshone Indian women on behalf of their Band. 44/ They assert that they are and have always been in possession of parts of the territory of the Western Shoshone Nation, an area recognized by the United States in the Treaty of Ruby Valley of 1863. They use the land for ranching, for religious purposes, for hunting and gathering, and other purposes. The United States claims that it now owns nearly all the land at issue and that the Western Shoshone rights to the land were extinguished by the Indian Claims Commission process more than 15 years ago. The United States claims that these Western Shoshones are trespassing on the land, and the United States has taken various measures to remove them and their livestock. In recent years, the discovery of one of the largest gold ore bodies in North America on this land has led to even greater pressure on these Western Shoshone people, who oppose open-pit gold mining.

59. The complaint asserts that the United States has never lawfully extinguished the Western Shoshone title and that the Indian Claims Commission process was discriminatory and lacking in due process of law. The principal allegations are summarized as follows. It is alleged that the attorneys prosecuting the claim falsely stated and agreed that the land had been taken and Western Shoshone title extinguished long ago, when in fact it had not. The lawyers were permitted by the Commission to represent all Western Shoshones when in fact they did not. The Commission refused to permit any other Western Shoshone tribe or group to object or to be heard in the proceeding. The Commission entered its award, although by then not a single Western Shoshone tribe approved of the claim. The United States Government encouraged and participated in the proceedings throughout. The Claims Commission award amounted to about $0.15 per acre for the land supposedly taken. The United States asserts that the complaint is inadmissable on various procedural grounds and on the ground that the facts do not constitute human rights violations. 45/ The Inter-American Commission requested the United States Government to stay its actions against the complainants pending the investigation of the facts by the Inter-American Commission. 46/

60. It is apparent from the proceedings in this matter that the United States has ostensibly extinguished the rights of Western Shoshone Indians to a large area of their ancestral land without according the ordinary rights of due process of law and fair market compensation that would have been accorded to non-Indian landowners. This is the more notable because the land at issue had been recognized as Western Shoshone land by the United States in a treaty it signed with the Western Shoshones in 1863. The Indian Claims Commission process appears to have been lacking in fundamental fairness in many respects, particularly the failure to assure proper representation of the supposed claimants, the lack of notice and opportunity to be heard for other Western Shoshone parties, the failure to require proof of the supposed taking of the land, and the award of just a few cents per acre for the land at issue. The Claims Commission process in this case, and reportedly in other cases as

well, appears to violate the fundamental requirements of non-discrimination and equality before the law. In all events, this case seems to demonstrate that for any claim process to be effective in resolving indigenous land rights issues it must be fundamentally fair.

61. The central legal problem in this case appears to be the doctrine, which has been discussed above (paras. 40-42), that the State can extinguish Indian or indigenous land rights without due process of law and without fair market compensation. This frankly discriminatory doctrine should be rejected by the United States and by all countries where it is found as a violation of existing human rights standards requiring equality before the law.

62. There have also been complaints about land claim mechanisms in other countries. In Canada, the process has been reported to be extremely time consuming. In New Zealand, anger has been expressed over allegedly unauthorized settlements of claims. 47/ In Australia, the provisions of the 1993 Native Title Act were drastically changed in 1998 to make native title claims significantly more difficult, particularly by providing a substantially higher threshold test for the registration of claims. These provisions have been found racially discriminatory. See paragraph 44 above.

## F. Expropriation of indigenous lands for national interests, including development

63. The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every part of the globe, indigenous peoples are being impeded from proceeding with their own forms of development consistent with their own values, perspectives and interests. The concentration of extensive legal, political and economic power in the State has contributed to the problem of development and indigenous peoples' rights to lands, territories and resources. In the Malaysian province of Sarawak, on the island of Borneo, for example, some one fifth of the land is classified as Native Customary Rights Land (and of this, only one tenth is titled to indigenous communities), but on this land the Government can override indigenous rights for timber concessions. 48/ In Indonesia it is reported that the Government purports to respect adat, or indigenous customary rights, unless the national interest is at stake; but economic development is equated with the national interest, and indigenous land rights are thus avoided. 49/

64. Moreover, the strict view of international law as solely the law of nations, and not of peoples or individuals, has furthered this narrow State-based approach to development. The notion of development can be linked directly to the affirmation of "permanent sovereignty over natural resources" 50/ and the rights of States to "freely utilize and exploit" 51/ their natural resources. Of particular relevance in this context is the State assertion that it has complete rights to subsurface resources. This view has had numerous unfortunate social, economic, environmental and cultural consequences. This is especially true in the case of the world's indigenous peoples, who have until recently perceived development as a very negative concept. Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from

outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development. For years, non-governmental organizations have been saying that indigenous peoples have been deprived of much or all of their land and that it has been turned over to commercial use or for development projects. 52/ In addition, development projects designed to benefit or which affect indigenous peoples have been carried out without the peoples concerned being consulted. The Working Group on Indigenous Populations has also been informed of development projects and activities that were initiated with international assistance and without the involvement, consent or consultation of indigenous peoples. Examples include State initiatives to build roads and highways with the financial assistance of the Inter-American Development Bank, and the World Bank's support for the building of dams in India and elsewhere. Other projects include the construction of dams that flood lands and terminate traditional economic practices of indigenous peoples, deforestation and gold-mining projects. 53/ National economic development schemes not only dispossess indigenous peoples of their lands, but also convert indigenous peoples into cheap labourers for industry, because the exploitation of their lands and the environmental degradation have deprived them of their livelihood. At its thirteenth session, an indigenous representative told the Working Group on Indigenous Populations about a national Parliament's approval of a contract with a logging company for an area of over 1 million hectares of rainforest. He claimed that the company's activities would destroy his peoples' ability to live in a traditional and peaceful way. Another matter brought to the attention of the Working Group, at its fourteenth session, by an indigenous representative from Asia involved a mining operation which had led not only to environmental degradation, but also to rioting among the indigenous peoples affected, which in turn had led to killing and torture by security forces.

65. Even in areas where economic development has resulted in the transfer of lands to indigenous communities, they have been unable fully to control such development. Specific examples include the Alaska Native Claims Settlement Act of 1971 and the James Bay and Northern Quebec Agreement of 1975. Other forms of development accompanied by blatant human rights violations include the gold mining in Yanomami Indian territory.

66. Oil and gas exploration and exploitation, geothermal energy development, mining, dam construction, logging, agriculture, ranching and other forms of economic activity ostensibly in the national interest have had an adverse impact both on indigenous peoples who have already suffered from contact and colonialism, and on indigenous peoples in areas long isolated. 54/ Often, development takes place without indigenous peoples' consent, consultation, participation or benefit.

## G. Removal and relocation

67. Removal of indigenous peoples from their lands and territories is both a historical and a contemporary problem worldwide. Removal of indigenous peoples from their lands and territories is considered by some States as an appropriate solution or a suitable means for "removing" a problem, whether it is done purportedly to protect indigenous peoples or to promote State interests in their lands, territories and resources. Such a policy must

rather be acknowledged as at best a postponement of dealing with the real matter of accommodating the rights and interests of the indigenous peoples concerned.

68. Removal and relocation are so widespread that the international community has responded in the context of human rights standard-setting: article 16 of ILO Convention No. 169; article 10 of the draft United Nations declaration on the rights of indigenous peoples; article XVIII.6 of the proposed Inter-American declaration on the rights of indigenous peoples. In connection with the elaboration of these specific standards, the term "forced" removal has been used to describe the coercive and abusive actions taken by Governments, without the consent of indigenous peoples, to remove them from their land. Instances of removal include the removal and relocation of the Mushuau Innu from Davis Inlet to Nutak 55/ and the High Arctic relocation of Inuit by the Government of Canada, the relocation of Inuit in northern Greenland by the Government of Denmark, and the expulsion of Kiowa Indians from their land by ranchers, with no action being taken by the United States Government despite recognition of Indian ownership of the lands in 1996. In the Working Group, numerous speakers have pointed to the forced expulsion of native peoples from their lands so that Governments could increase logging and oil concessions to multinational corporations. Others have spoken of removal purportedly to protect indigenous communities from military manoeuvres or armed conflict.

69. Indigenous peoples have characterized population transfers and forced relocation as a very serious problem. These involuntary transfers and relocations have meant the loss of traditional lands and traditional ways of life, with devastating consequences for the social and economic welfare of the communities concerned. A joint statement to the Working Group at its eighth session in 1990 by indigenous organizations highlighted the negative impact of population transfers on indigenous cultures. Governments have used them to counter claims to self-determination, to impose non-indigenous national cultures and to facilitate the disposal of natural resources. Justification for relocations included overpopulation, need for resettlement, transmigration, resource exploitation and security.

### H. Other government programmes and policies adversely affecting indigenous peoples' relationship to their lands, territories and resources

70. There are a range of other government programmes and policies which must be noted because they have been widely used and abused to justify violating indigenous land rights. It appears that some States have been unaware of the baneful effects of such programmes and policies, which are briefly addressed below.

#### 1. Allotment of land to individuals

71. Programmes of this sort divide commonly held indigenous land and allot land to individuals or families. These programmes invariably weaken the indigenous community, nation or people and usually result in the eventual loss of most or all of the land. The supposed advantages of permitting individuals to use their land as collateral for loans is in fact far outweighed by the

almost inevitable loss of the land and the resulting overall decline in resources available to indigenous peoples. The experience of the Mapuche peoples in Chile during the 1970s and 1980s is a sorrowful example. 56/

2. Settlement programmes

72. States often view indigenous peoples' territories as areas suitable for settlement by non-indigenous peoples - even though the resources in the area provide only a modest economy for the indigenous owners. The results of such programmes appear to be even greater poverty and social unrest. The encouragement of settlement in the Chittagong Hill Tracts in Bangladesh is an example, and the problem has also been reported in South America.

3. State assumption of trust title

73. In certain countries, particularly in the Americas, States 57/ have created the legal notion that the State itself holds title to all or most indigenous lands and holds that title in trust for the various indigenous nations, tribes or peoples. This legal status for Indian land has been given scholarly attention in the United States. 58/ There are many problems with such systems of trust title. They are usually imposed without the indigenous peoples' consent. They often give to the State extensive power to control the use of the land and its resources. The indigenous tribe or nation often has no adequate remedy for breach of the trust responsibility or abuse of the State's power to control or dispose of their lands and resources. The responsibility of the trustee, the State, is likely to be poorly defined and is likely to be in conflict with the State's other proprietary and governmental interests. Systems of trust title, depending upon the circumstances, may make indigenous ownership of land and resources a second-class legal right, and as such they are or can be racially discriminatory.

4. Loan programmes

74. As mentioned in the section concerning allotment of lands, programmes that encourage using indigenous lands as collateral for loans are likely to result in the eventual loss of indigenous lands and resources. This appears to be due in part to the relative lack of economic power of most indigenous peoples, as a result of which almost any programme that makes indigenous lands or resources a commodity in the market place is likely to result in the loss of these resources to the indigenous peoples concerned. This is not to say that indigenous peoples should not participate in market economies, but they should do so on terms of fairness and equality.

5. Management of sacred and cultural sites by Governments

75. In many countries, particular sites or areas of land that are of great religious or cultural significance to indigenous peoples are now in the ownership of the State or a governmental subdivision of the State. This situation may present a special problem, even where title to the land is not contested, when they are managed in a way that prohibits or interferes with indigenous access or indigenous religious practices tied to the site.

## I. Failure to protect the integrity of the environment of indigenous lands and territories

76. For analytical purposes it is useful to identify situations that involve deprivation of indigenous land rights through activities that destroy the integrity of the environment of indigenous peoples. The problems regarding environmental degradation and development illustrate the specific matter of State failure to protect the integrity of indigenous peoples' lands, territories and resources from both direct and indirect adverse impacts. Furthermore, this question relates to global environmental problems as well as national development initiatives.

77. One aspect of the problem is that indigenous peoples' territories and lands do not always follow State, provincial or other administrative boundaries. Indigenous peoples whose territories transcend State boundaries include many indigenous peoples in Central and South America, the Mohawk Nation in Canada and the United States, and the Inuit of the Russian Far East, the United States, Canada and Greenland. The diversity of interests, laws, policies and national development schemes in different jurisdictions can have direct adverse impacts upon the integrity of indigenous lands, territories and resources. States claiming jurisdiction or authority over territories often do not recognize the impacts that their policies will have outside their borders. For example, the debate about the Arctic National Wildlife Refuge in Alaska is an international matter, one that affects the interests of various indigenous peoples who depend upon the caribou (and its habitat) and who live in both the United States and Canada. The integrity of this wildlife resource is not being adequately considered in the discussions about development of the Arctic National Wildlife Refuge.

78. In addition, though Governments may initiate and require environmental impact assessments, too often indigenous peoples' perspectives and values are overlooked in State efforts to mitigate or minimize environmental degradation. Other failures to protect the integrity of indigenous lands, territories and resources include transboundary pollution, dumping of hazardous or toxic waste, ocean dumping, ozone layer depletion, militarization and diminishing supplies of fresh water.

79. The profound, highly complex and sensitive relationship that indigenous peoples have to their lands, territories and resources must be taken into account in protecting the integrity of their environment from degradation. Again it includes social, economic, cultural and spiritual dimensions which must not be overlooked in the present discussion. Cultures that have flourished as an integral part of the environment, cannot continue to tolerate disruption. The dependence of indigenous peoples upon the integrity of their lands, territories and resources remains a highly significant factor.

## J. Land and resource use and management, and internal self-determination regarding indigenous lands, territories and resources

80. An important dimension in affirming indigenous land rights is the exercise of a measure of control over lands, territories and resources by indigenous peoples through their own institutions. Though rights to lands,

territories and resources may be affirmed, the exercise of internal self-determination, in the form of control over and decision-making concerning development, use of natural resources, management and conservation measures, is often absent. For example, indigenous people may be free to carry out their traditional economic activities such as hunting, fishing, trapping, gathering or cultivating, but may be unable to control development that may diminish or destroy these activities.

81. This section has briefly surveyed a number of the problems that face both Governments and indigenous peoples. The following section provides some examples of efforts to resolve some of these contemporary problems, with a view to finding solutions for the future.

## IV. ENDEAVOURS TO RESOLVE INDIGENOUS LAND ISSUES AND PROBLEMS

82. There are many positive and practical examples of advances worldwide regarding indigenous land rights; only a few can be noted in this working paper. Most of these developments represent a change in philosophy, a slight retreat from the orientation which denied the rights of indigenous peoples towards a modern human rights programme that is beginning to embrace the values, perspectives and philosophies of indigenous peoples. However, no tidal change has taken place. Despite the advances and positive developments, urgent problems remain.

83. Positive measures may be divided into five groups: (a) judicial mechanisms; (b) mechanisms for negotiation; (c) constitutional reform and framework legislation; (d) indigenous peoples' initiatives; and (e) human rights standards.

### A. Judicial mechanisms

84. In the sections dealing with the failure to acknowledge claims and the discriminatory policies that persist with regard to indigenous land issues, there was brief mention of the difficulties that indigenous peoples face with respect to judicial mechanisms by which they can secure their rights. This working paper will briefly survey and evaluate a few of the judicial actions already taken by indigenous peoples and consider the future of such courses of action.

85. Significant cases in both the domestic and international arenas have had mixed results. Between the 1933 decision of the Permanent Court of International Justice (Eastern Greenland) and the Western Sahara decision of the International Court of Justice in 1975, it is clear that legal thought had evolved with regard to the place of indigenous peoples. The Marshall decisions of the United States Supreme Court have been interpreted as being both good and bad: good in the sense that Marshall insisted upon the recognition of Indian land rights and the right to self-government; however, Marshall's construction of these rights was within the framework of the doctrine of discovery.

86. An example of the mixed results or limitations of judicial mechanisms is the Mabo case in Australia. This decision was positive in that it denounced the doctrine of terra nullius. However, from the perspective of Aboriginal

peoples in Australia, the decision did not remove all of the cultural biases, nor did it flesh out or fully examine the assumed State authority and power to determine the extent of indigenous land rights. Judges, like others, are likely to be fearful of the unknown cost of resolving these issues. Hence, there is an apparent tendency to ensure that openings for interpretation remain. This is evident in recent actions prompted by another case before the Australian High Court. In Wik Peoples v. Queensland, in December 1996, the High Court of Australia found that native title was not necessarily removed or extinguished by pastoral leases. 59/ Pastoral leases cover vast areas of land and are essentially interests granted by government for the purpose of raising sheep, cattle or other animals. This case, combined with the Mabo decision, led to the enactment of the Native Title Amendment Act in 1998 exercised legislative power to extinguish indigenous or native title and thus practically negate most of the legal rights recognized by the Court. This has been discussed above in paragraphs 44 and 62.

87. For a limited class of cases and a limited number of indigenous peoples, United States law provides a means for the return of indigenous lands. The Supreme Court has decided that the title to land taken in violation of a certain Act of Congress remains the property of the Indian owners. However, practically no Indian lands have actually been returned by action of the United States courts. Numerous suits for the recovery of lands have been filed and in several cases negotiation and legislation have led to the return of significant areas of land to a few Indian tribes.

88. Another example of a judicial or quasi-judicial mechanism is the Waitangi Tribunal in New Zealand, which is a statutory body created to address claims by Maori of breaches of the Treaty of Waitangi. 60/ The decisions of the Waitangi Tribunal have been credited with helping to resolve some long-standing Maori land grievances. However, there have also been criticisms and complaints based upon the Tribunal's limited power, as well as of some decisions and negotiated settlements reached in connection with cases before the Tribunal.

89. At present, it is safe to say that the use of judicial mechanisms may be risky because of the problem of different interpretive tools, the subjective and highly political nature of these State-chartered forums, and continuing cultural biases demonstrated by Governments. The mechanisms referred to above represent some examples of the judicial mechanisms which exist and have been employed. Governments and indigenous organizations will be called upon to supply further information about positive measures with regard to judicial mechanisms.

### B. Mechanisms for negotiation

90. Mechanisms for negotiation may allow for a broader set of issues, concepts and perspectives to explore the accommodation of indigenous peoples' rights to lands. They may also provide a greater opportunity for both sides to achieve or create genuine understanding and to engage in confidence-building. Negotiation, if undertaken with full respect for and recognition of the fundamental rights of indigenous peoples, can also

contribute to ongoing and lasting political and legal relationships. Such an alternative may prove to be more constructive to both Governments and indigenous peoples, as well as others.

91. A recent example of the creation of an international mechanism for negotiation is the formation of the Arctic Council, which includes eight Arctic-rim States and representatives of the Association of Small Nations of the Russian North, the Nordic Saami Council and the Inuit Circumpolar Conference. The basic document of this new body also provides for the direct participation of other indigenous peoples' organizations from this geographic region. Though indigenous peoples are not entirely pleased with the few qualifications put into the document, they are nonetheless at the negotiating table and able to register their concerns relating to environmental and development matters.

92. Another international mechanism was the procedure that resulted in the negotiated peace agreements in Guatemala. Within this process, the United Nations played a role in the conclusion of the Agreement on the Identity and Rights of Indigenous Peoples. The Agreement includes far-reaching provisions on indigenous lands, restitution, acquisition of land and other measures. 61/

93. In Canada, the British Columbia Treaty Commission was established by Canada, the Government of British Columbia and the First Nations Summit (an organization of indigenous First Nations), with a mandate to facilitate the negotiation of modern treaties in the province of British Columbia. The Commission consists of five commissioners: two nominated by the Summit, one nominated by each of the federal and provincial governments, and a Chief Commissioner chosen by all three principals. The Commission opened its doors in December 1993. As of October 1997, the Commission had accepted statements of intent to negotiate treaties from 51 First Nations (representing over 70 per cent of the First Nations in the province), had made annual funding allocations to First Nations for participation in negotiations and had declared 42 negotiation tables as ready. According to the Government of Canada, as of May 1998, more than 30 framework agreements had been signed, and these First Nations had entered into "agreement-in-principle negotiations".

94. Recent negotiated agreements include the Nunavut Agreement (creating a new territory in northern Canada) and a number of other agreements with First Nations in Canada. According to the Government, 12 comprehensive land claims agreements have been settled since the announcement of the Federal Government's comprehensive claims policy in 1973. The Nisga'a Treaty is the furthest along in the treaty-making process, having been approved by both the Nisga'a and the provincial parliament of British Columbia in 1999. The agreement recognizes Nisga'a rights to approximately 2,000 square kilometres of land and acknowledges their rights to self-government in that territory. The Nisga'a Treaty is expected to set a precedent that will be used to resolve approximately 50 similar claims brought by Indian peoples in Canada. Upon its approval by the Federal Government of Canada, the Nisga'a Treaty will be the thirteenth land claim settled. The six most recently completed agreements are with the Yukon First Nations and include similar self-government agreements. The Federal Government has expressed its commitment to maintaining momentum on claims settlement and in 1998 reported

participating in approximately 70 modern treaty negotiations. In its submission to the Special Rapporteur, the Government provided the following observations:

> "Steady progress is being made. Settling claims does take time as it is important to get it right: treaties are solemn and legally-binding documents which are protected by the Constitution of Canada. It also takes time because negotiations are complex, involving many stakeholders and intersecting jurisdictions. In Canada, there are three parties at the table: the Federal Government, the provincial (or territorial) government, and the Aboriginal group. Separate federal-provincial discussions are required on many key aspects such as cost-sharing and jurisdictional arrangements, while a very wide range of lands and resources and self-government issues are on the table. Public and private legal interests must be dealt with fairly, and negotiations are often complicated by several Aboriginal groups claiming the same area."

95. The Government of Canada drew particular attention to negotiated settlements of land claims as a positive and practical measure for achieving desirable goals with respect to indigenous peoples' relationship to lands and resources. The Government pointed out in its submission:

> "Land settlements provide many opportunities, in that much can and has been done within the claims negotiation process to further the goals of Aboriginal people for a continuing relationship to lands and resources in their traditional territories. Land claims agreements in Canada have provided Aboriginal groups with rights and benefits which include: full ownership of certain lands in the area covered by the settlement; guaranteed wildlife harvesting rights; guaranteed participation in land, water, wildlife and environmental management throughout the settlement area (typically by membership on committees, boards or other decision-making bodies); financial compensation; resource revenue-sharing; specific measures to stimulate economic development; and a role in the management of heritage resources and national parks of the settlement area. Co-management arrangements have reflected the principle of parity of membership between Aboriginal and government representatives; and have respected and incorporated the traditional knowledge of Aboriginal people, as well as scientific knowledge.
>
> "Financial benefits in settlement agreements can provide Aboriginal communities with much needed capital for investment and economic growth, while increased training and educational opportunities can contribute to self-sufficiency. Royalty sharing arrangements can provide an important ongoing source of revenue. In these and other ways, modern treaties provide an important springboard to economic and political growth."

96. The friendly settlement procedure of the Inter-American Commission on Human Rights has provided a context for the negotiation of indigenous land

rights. When a human rights petition is filed with the Commission, the Commission has the competence, pursuant to the American Convention on Human Rights, to "place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for human rights recognized in [the] Convention". In March of 1998, the Commission announced the settlement of a land claim between the Government of Paraguay and the indigenous communities of Lamenxay and Riachito pursuant to an agreement to transfer a large area of land to the Indian claimants. This settlement is the first agreement in the inter-American human rights system which restores land rights to an indigenous community. In another case, in February 1999, the Commission formally oversaw the beginning of formal negotiations between the Government of Belize and the Maya Indian people of southern Belize. The context of the negotiations is a long campaign by Maya leaders to secure recognition of their lands. These indigenous peoples had found themselves without any formal, legal rights to the lands where they have traditionally lived. The land is regarded by the Government as simply "public" land. Since 1993, the Government had secretly granted 17 logging concessions to log more than 500,000 acres of Maya land, and had granted oil and gas concessions covering practically the entire area, all without consultation with the Maya. The Maya filed legal proceedings in the courts of Belize without success and in 1998 filed a petition with the Inter-American Commission on Human Rights asserting that the concessions and the failure to recognize Maya land rights were a violation of their human rights. Negotiations have just begun. The Government's willingness to negotiate under the auspices of the Inter-American Commission suggests that this may prove to be a useful and positive approach for resolving this land issue.

97. Finally, the substantive, constructive and formal dialogue at the international, national and local levels concerning international indigenous human rights standards may prove to be a fruitful method or mechanism for creating understanding about the values and perspectives of indigenous peoples. Such a process of education will be necessary for effective steps to be taken towards resolving long-standing conflicts and understanding the implications of accommodating the competing rights and interests of indigenous peoples and States.

### C. Constitutional reform and framework legislation

98. In certain countries, significant steps have been taken to recognize or secure indigenous land rights through specific legislation to return certain areas of land or through general, framework legislation to protect indigenous land or resolve indigenous land issues. A particularly notable example in recent years is the Constitution of Brazil, adopted in 1988. 62/ The Constitution incorporates significant provisions calling for the demarcation and protection of indigenous lands. The Native Title Act of 1993 in Australia is another example. In Canada, the Constitution Act of 1982, section 35, gives constitutional protection to then-existing aboriginal land rights; and land claim settlements, as treaties, are now similarly given constitutional protection.

99. Some countries have taken more specific action to return land to indigenous peoples or to recognize or respect indigenous land areas. Examples include the return of land to indigenous peoples in Argentina. 63/ Under constitutional reform laws of 1994, the Government has now returned

almost 4 million acres to some of Argentina's 600,000 indigenous peoples and reportedly plans to hand over 988,400 more acres by 1999. In Colombia, similar return of land has taken place in recent years. Information about the success of these measures and the problems associated with them deserve close attention.

100. The Greenland Home Rule Act of November 1978 is probably one of the best examples of constructive framework legislation to accommodate the rights and aspirations of indigenous peoples. The rights of ownership to lands in Greenland have been arranged in a very distinct fashion, consistent with the Greenlandic Inuit land tenure systems. One significant feature of the Act is the granting to the Inuit of authority to make decisions concerning the use of the lands. In particular, with regard to development activities, the Greenland Home Rule Government, or Landsstyret, which is elected by the Parliament, has veto power over development activities.

101. Despite the failure of a referendum to approve the Charlottetown Accord, the constitutional debate in Canada allowed for the exploration of a more effective context for the realization of rights and principles that may guide relations between the Government and indigenous peoples. This process generated awareness and increased knowledge, through national debate, about the distinct rights and status of indigenous peoples in Canada. Again, though it did not respond sufficiently to such fundamental concerns as the need of indigenous peoples for an adequate land and resource base and the obligations of the State, the Accord provided for a constructive political and legal relationship, in the context of the Constitution, between indigenous peoples and the Government.

## D. Indigenous peoples' initiatives

102. It must be noted that indigenous peoples themselves are initiating various projects and programmes with regard to their lands, territories and resources which contribute to the safeguarding and promotion of their rights. Examples include management and co-management of resources in Alaska and elsewhere. Indigenous peoples are also contributing to global and national environmental protection initiatives. For example, the role of indigenous non-governmental organizations at the United Nations Conference on Environment and Development was critical to the drafting and adoption of chapter 26 of Agenda 21. This is a positive contribution by indigenous peoples to the world community.

103. Indigenous peoples in certain countries have initiated mapping projects as a means for documenting and specifying their traditional land ownership and land use practices. This may prove to be an important means for creating broader awareness and understanding of indigenous land ownership and for creating a basis for eventual legal recognition and protection of these land and resource rights. In Belize, the mapping project of the Maya Indian people of the Toledo district resulted in the publication in 1998 of the Maya Atlas: The Struggle to Preserve Maya Land in Southern Belize, which is said to be the first indigenous-produced atlas in the world. The Maya Atlas, produced by the Toledo Maya Cultural Council and the Toledo Alcaldes Association, documents the Mopan and Ke'kchi Maya's traditional and current use of their land and includes a unique description of Maya history, culture, land tenure and socio-economic activities. The Maya Atlas contains maps of every Maya village

in southern Belize - each one hand drawn by Maya community researchers who interviewed every household in the village. The atlas is part of an effort to win legal protection for Maya land. Mapping by indigenous peoples as a means of clarifying land rights is also being done in other countries. The role of indigenous peoples in the Arctic Council, which primarily concerns itself with environmental protection and development in the Arctic, is another useful example in this respect.

### E. Human rights standards and mechanisms

104. The existing and emerging norms and minimum standards contained in the Rio Declaration, the Convention on Biological Diversity, ILO Convention No. 169, the proposed Organization of American States American declaration on the rights of indigenous peoples and the draft United Nations declaration on the rights of indigenous peoples should all be seen as a way to resolve the problems between States and indigenous peoples. The various mechanisms established for dealing with human rights complaints have been used to some extent by indigenous peoples.

105. In addition, the emerging human rights norms relating to the right to development, intergenerational rights, the right to peace and the right to a safe and healthy environment are areas in which indigenous peoples are beginning to influence old thinking and bring about the progressive development of standards that are more sensitive, responsive and useful to indigenous peoples and humankind generally. The conclusions of the Bruntdland report should not be omitted from this review of change and development of human rights standards. Our Common Future, the report of the Bruntdland Commission, gave recognition to the unique situation of indigenous peoples:

> "The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and other resources that sustain their way of life - rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their areas." 64/

## V. CONCLUSIONS

106. This working paper illustrates the need for a fluid and flexible atmosphere surrounding the consideration of indigenous peoples and their relationship to land. It must be acknowledged that an important evolution is taking place. The ongoing development of indigenous peoples' rights to lands, territories and resources must be seen as an opportunity for both indigenous peoples and States to contribute to the progressive development of human rights standards. It must be acknowledged that legal concepts, rights and, indeed, indigenous peoples themselves cannot be frozen in time. Indigenous communities and societies change and evolve like all other societies.

107. This working paper, above all else, should be regarded as evidence of the urgency of indigenous land issues. There is an urgent need to find solutions to the long-standing problems that exist between Governments and indigenous peoples. The very survival of indigenous peoples is at risk owing to the continuing threats to their lands, territories and resources.

108. The Special Rapporteur has had the advantage of studying the report of the Expert Seminar on Practical Experiences regarding Indigenous Land Rights and Claims, held in accordance with General Assembly resolution 49/214 of 23 December 1994, Commission on Human Rights resolution 1994/29 of 4 March 1994 and Economic and Social Council decision 1994/248 of 22 July 1994 (E/CN.4/Sub.2/AC.4/1996/6). This report, along with much useful information and analysis, provides many useful and constructive conclusions and recommendations that deserve close attention. A number of these conclusions and recommendations are repeated here.

109. Indigenous peoples have a distinctive and profound, spiritual and material relationship with their lands, and with the air, waters, coastal sea, ice, flora, fauna and other resources. This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities.

110. Historically, indigenous peoples in most parts of the world have been deprived of their lands and resources in whole or in part through many unjust processes including: military force, unlawful settlements, forcible removal and relocation, legal fraud, and expropriation by the Government.

111. Indigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources.

112. One of the most widespread contemporary problems is the failure of States to recognize the existence of indigenous land use, occupancy and ownership, and the failure to accord appropriate legal status and legal rights to protect that use, occupancy or ownership

113. In some countries, indigenous communities do not have the legal capacity to own land, or do not have the capacity to own land collectively.

114. Aboriginal title, by which indigenous land is often held, is often subject to the illegitimate assumption of State power to extinguish such title, in contrast to the legal protection and rights that, in most countries, protect the land and property of other citizens. This single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples.

115. In those countries with a body of law concerning indigenous peoples, the most significant problems arise because of discriminatory laws and legal doctrines that are applied regarding indigenous peoples, their lands and resources.

116. Such discriminatory doctrines include: the doctrine of terra nullius, the doctrine that indigenous land title can be extinguished without due

process or compensation, the doctrine of "plenary power", and the doctrine that treaties with indigenous peoples can be violated or abrogated without any remedy.

117. In terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands.

118. The failure of States to implement or enforce existing laws for the protection of indigenous lands and resources is also a widespread problem.

119. Claims processes that are improper, grossly unfair or fraudulent have been a severe problem for indigenous peoples in certain countries.

120. The expropriation of indigenous lands and resources for national development is a growing and severe problem. Development projects are frequently undertaken on indigenous lands and territories without indigenous consent or even consultation.

121. Removal and relocation of indigenous peoples is a continuing problem.

122. Other significant problems that have been identified are: programmes to allot indigenous lands to individuals; settlement programmes on indigenous lands; the practice of requiring that indigenous land be held in trust by the State; programmes that use indigenous lands as collateral for loans; adverse management of sacred and cultural sites by States; failure of States and others to protect the environmental integrity of indigenous lands and resources; and the failure to accord indigenous peoples an appropriate right to manage, use and control development of their lands and resources.

123. A number of positive, practical measures for resolving indigenous land issues have been identified. The most encouraging and productive of these measures appear to be those that are based on fair and voluntary negotiations between the State and the indigenous people, either at the national level or under the auspices of an international body.

124. The existence of a fair constitutional and legal system, including a fair judicial system, able to guarantee due process of law, is an important framework for the success and implementation of land settlement processes. In some countries experience has shown that the establishment of fair judicial processes for the implementation of treaties, agreements and other constructive arrangements with indigenous peoples has been a useful means for encouraging respect for such agreements and for the education of the indigenous and non-indigenous communities.

125. For any claim process to be effective in resolving indigenous land rights issues it must be fundamentally fair.

126. Experience has shown that the equitable and fair conclusion and implementation of treaties, agreements and other constructive arrangements relating to land between States and indigenous peoples can contribute to environmentally sound and sustainable development for the benefit of all.

127. Governments have a responsibility to ensure indigenous peoples have access to adequate resources to research and negotiate their claims so that settlements are equitable, just and enduring.

128. It is important that practical effect be given to the spirit and intent of treaties and agreements concerning lands and resources. This requires a willingness by the parties to act as partners, not adversaries, as well as a clear understanding by all parties of the spirit and intent of treaties and agreements concerning lands and resources.

129. In many countries, there is a need for general or framework legislation to recognize and give legal protection to indigenous lands and resources. In some countries, there is a need to make changes to the constitution in order to achieve a desirable level of legal protection for indigenous lands and resources.

130. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) is regarded by many indigenous peoples as articulating some minimum standards respecting indigenous land rights.

131. The draft United Nations declaration on the rights of indigenous peoples as adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities presents an opportunity for States to adopt an instrument reflecting a broad consensus among indigenous peoples and experts about indigenous land and resource rights.

## VI. RECOMMENDATIONS

132. Countries where such legislation does not exist should enact legislation, including special measures, to recognize, demarcate and protect the lands, territories and resources of indigenous peoples in a manner that accords legal protection, rights and status at least equal to those accorded other lands, territories and resources in the country.

133. Such legislation must recognize indigenous peoples' traditional practices and law of land tenure, and it must be developed only with the participation and consent of the indigenous peoples concerned.

134. Special measures regarding indigenous land and resources must not deprive indigenous peoples of legal rights with respect to land and resources that other groups and individuals in the country enjoy.

135. Within the legal context of each country, consideration must be given to the need to reform the relevant portions of the Constitution in order to assure the necessary level of legal protection for indigenous lands and resources and particularly to assure that indigenous rights to lands and resources are not subject to invasion or diminution by the Government.

136. Governments should formally renounce discriminatory legal doctrines and policies which deny human rights or limit indigenous land and resource rights.

In particular, they should consider adopting corrective legislation, constitutional amendments or corrective policies, as may be appropriate,

within the International Decade of the World's Indigenous People, regarding the following:

(a) The doctrine of terra nullius;

(b) The doctrine that indigenous communities do not have the capacity to own land or to own land collectively;

(c) The doctrine that indigenous land, title or ownership may be taken or impaired by the State or third parties without due process of law and adequate and appropriate compensation;

(d) Doctrines or policies that indigenous lands must be held in trust regardless of the will of the indigenous peoples concerned;

(e) Doctrines and policies that unilaterally effect an extinguishment of indigenous land rights, title or ownership;

(f) Policies which exclude some indigenous peoples from the land claims processes established by the State.

137. Countries must abjure power with respect to indigenous peoples, their lands and resources that is not limited by respect for human rights and rights generally applicable in the country.

138. Rights and property protections must not be diminished or denied on the ground that title or other interest is held in common or held by an indigenous people or group rather than by an individual.

139. Governments are encouraged to consider the establishment and use of impartial mechanisms, including international mechanisms, to oversee and facilitate fair and equitable resolutions of indigenous land and resource claims and the implementation of land agreements.

140. Governments, in consultation with indigenous peoples, should establish fair procedures for reviewing situations and for taking corrective action in situations in which indigenous land or resources have been taken or extinguished through past processes which are claimed or are found to be fundamentally unfair or discriminatory.

141. Countries should each consider creating a permanent capital fund for the purpose of compensating indigenous peoples for past takings of lands and resources, where return of the lands or equivalent lands and resources is not possible.

142. Effective measures should be provided by States for implementation, dispute resolution, amendment and enforcement of land settlements and agreements.

143. Countries and intergovernmental bodies, including the United Nations, should identify means for meeting the serious needs for training, education and financial and technical resources so that indigenous peoples may enter negotiations processes fully informed and technically equipped with respect to

the whole spectrum of implications of land rights negotiations. Training and education should also figure prominently in settlements implementation.

144. In its consideration of a permanent forum for indigenous peoples, the Commission on Human Rights, the Economic and Social Council and the General Assembly should consider whether the forum could play a constructive role regarding problems pertaining to land and resource rights and environmental protection. In particular, consideration should be given to the following:

(a) The creation of a fact-finding body, with a mandate to make site visits and to prepare reports concerning particular indigenous land and resource issues;

(b) The creation of an indigenous land and resource ombudsman or office which could provide response, mediation and conciliation services;

(c) The creation of a complaint mechanism or procedure for indigenous land and resource situations where human rights violations are present;

(d) The creation of a body with "peace-finding" powers to investigate situations, recommend solutions, conciliate, mediate and otherwise assist in preventing or ending violence in situations regarding indigenous land rights;

(e) The creation of a procedure whereby countries would be called upon to make periodic reports with regard to their progress in protecting the land and resource rights of indigenous peoples.

145. The United Nations and its specialized agencies should consider providing technical assistance to States and to indigenous peoples to contribute to the resolution of land claims and other land and resource issues.

146. The United Nations, its specialized agencies and other intergovernmental organizations should assure that indigenous peoples' cultural diversity, traditional values and ways of life are protected in the implementation of Agenda 21 and by the institutions established for its follow-up.

147. The United Nations High Commissioner for Human Rights should consider collecting examples of indigenous land agreements in order to facilitate the promotion of technical cooperation in this field.

148. States should make best efforts to guarantee access to land on the part of indigenous peoples who have been deprived of land or who lack sufficient land and depend upon it for their survival, in order to guarantee their cultural and material development.

149. Indigenous peoples should participate in decision-making and policy-making regarding land, resources and development at the international, regional, national and local levels, including United Nations processes such as the Commission on Sustainable Development and the Convention on Biological Diversity.

## Notes

1/ The relevant paragraphs are as follows:

"The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Acknowledging that indigenous peoples in many countries have been deprived of their human rights and fundamental freedoms and that many of the human rights problems faced by indigenous peoples are linked to the historical and continuing deprivation of ancestral rights over lands, territories and resources,

Recognizing the profound spiritual, cultural, social and economic relationship that indigenous people have to their total environment and the urgent need to respect and recognize the rights of indigenous people to their lands, territories and resources,

Acknowledging that lack of secure land rights, in addition to continued instability of State land tenure systems and impediments to efforts for the promotion and protection of indigenous communities and the environment, are imperiling the survival of indigenous peoples,

Recognizing that United Nations organs and Member States have increasingly acknowledged that lands and natural resources are essential to the economic and cultural survival of indigenous peoples, and that some States have enacted legal measures that uphold indigenous land rights or have established procedures for arriving at legally binding agreements on indigenous land-related issues,

Mindful of the development of relevant international standards and programmes which promote and affirm the rights of indigenous peoples to their lands and resources, in particular, the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization, Agenda 21 adopted by the United Nations Conference on Environment and Development, World Bank Operational Directive 4.20, the draft Inter-American declaration on the rights of indigenous peoples develcped by the Inter-American Commission on Human Rights of the Organization of American States, and the draft United Nations declaration on the rights of indigenous peoples,

Recognizing that despite these international and national advances, problems continue to abound which impede the effective enjoyment of indigenous land rights,

Recalling that many States in which indigenous peoples live have yet to enact laws or policies regarding indigenous land claims or in other instances have not provided adequate implementing mechanisms concerning indigenous land rights that are mutually acceptable to the parties concerned,".

2/ Communication from Manju Yakthumba, Chairman, Kirat Yakthung Chumlung, Katmandu, to Mr. John Pace, 5 January 1998.

3/ Lionel Caplan, "Tribes in the ethnography of Nepal: some comments on a debate", in Nepalese Studies, vol. 17, No. 2 (Katmandu, CNAS, Tribhuvan University, July 1990), cited in the communication referred to in note 2 above.

4/ Robert A. Williams, "Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world", Duke Law Journal, 1990, p. 981.

5/ James sake Henderson, "Mikmaw tenure in Atlantic Canada", Dalhousie Law Journal, vol. 18, No. 2, 1995, p. 196.

6/ Statement by Eben Hopson, founder of the Inuit Circumpolar Conference (ICC), at the organizing conference held in Barrow, Alaska, in June 1977, and also contained in a statement by the ICC representative to the Working Group in 1985.

7/ United Nations publication, sales No. E.86.XIV.3.

8/ Ibid., paras. 196 and 197.

9/ Proposed Inter-American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on 26 February 1997.

10/ Rodolfo Stavenhagen, "The status and rights of the indigenous peoples of America", report prepared for the Inter-American Commission on Human Rights, July 1991.

11/ The views of early international legal theorists are discussed in Robert Williams, The American Indian in Western Legal Thought: The Discourses of Conquest, Oxford University Press, 1990, and "The Medieval and Renaissance origins of the status of the American Indian in Western legal thought", Southern California Law Review, vol. 57, No. 1, 1983, pp. 68-85. See also S. James Anaya, Indigenous Peoples in International Law, Oxford University Press, 1996.

12/ Vine Deloria, Jr., American Indians, American Justice, University of Texas Press, 1983, p. 36.

13/ Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J. (ser. A/B) No. 53.

14/ Western Sahara, Advisory Opinion, 1975 I.C.J. 12.

15/ Reports of the Working Group on Indigenous Populations E/CN.4/Sub.2/1993/29, E/CN.4/Sub.2/1994/30 and Corr.1, E/CN.4/Sub.2/1995/24 and E/CN.4/Sub.2/1996/21 and Corr.1. See also, Willheim, "Queensland pastoral leases and native title", Aboriginal Law Bulletin, vol. 3, No. 89, 1997, p. 20; M. Dodson, "Human rights and extinguishment of native title", 1995.

16/ See also the Conclusions and Recommendations contained in the Report of the Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States, Geneva, 16-20 January 1989 (HR/PUB/89/5).

17/ Rodolfo Stavenhagen, op. cit., p. 22. The situation of indigenous peoples of the Philippines is addressed in a paper prepared by Donna Gasgonia for the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, Whitehorse, Canada, 24-28 March 1996 (E/CN.4/Sub.2/AC.4/1996/6/Add.1).

18/ Kristyna Bishop, "Squatters on their own land: San territoriality in western Botswana" (1998) 31 Comparative and International Law Journal of Southern Africa 92.

19/ Communication from Rev. Leva Kila Pat, General Secretary, Papua New Guinea Council of Churches, 22 April 1998.

20/ Alan Thein Durning, "Guardians of the land: indigenous peoples and the health of the Earth", Worldwatch Paper 112 (December, 1992), pp. 21-22. The Indigenous Peoples Right Act of 1997 now provides a means for recognition of indigenous land rights. The usefulness of the Act deserves careful evaluation.

21/ Ibid.

22/ See Newton, "At the whim of the Sovereign: Aboriginal title reconsidered", Hastings Law Journal, vol. 31, No. 1215, 1980; Cohen, "Original Indian title", Minn L. Rev., vol. 32, 1947; Smith, "Concept of native title", Toronto Law Journal, vol. 24, No. 1, 1974; McHugh, "The constitutional role of the Waitangi Tribunal", New Zealand Law Journal, vol. 224, No. 3, 1985.

23/ Aboriginal title has received considerable scholarly attention in Canada. See, for example, Kent McNeil, Common Law Aboriginal Title (Oxford, Clarendon Press, 1989); "The meaning of Aboriginal title" in Michael Asch, ed., Aboriginal and Treaty Rights in Canada. (Vancouver, UBC Press, 1997.) Sanders, Douglas, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314.

24/ See report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, loc. cit.

25/ Felix Cohen, the foremost scholar of United States law in regard to Indian affairs, commented on the discriminatory nature of property ownership by Indian tribes: "That there are peculiar incidents attached even to fee-simple tenure by an Indian tribe is an undoubted fact, and the explanation of this fact is probably to be found in the contagion that has emanated from the concept of aboriginal possession". Handbook of Federal Indian Law, 1942, p. 291.

26/ See P. Joffe and M.E. Turpel, Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives. A comprehensive study by the Royal Commission on Aboriginal Peoples (Canada), 3 volumes, June 1995; and Treaty Making in the Spirit of Coexistence: An Alternative to Extinguishment. A report by the Royal Commission on Aboriginal Peoples, Ottawa, 1995.

27/ See Vattel, The Law of Nations, Book 1, 1805, chap. XVIII. An account of the extinguishment policies of Spain, France and England during the colonial period is set forth in Royce, "American Indian land cessions", Introduction by Cyrus Thomas, Bureau of American Ethnology, Eighteenth Annual Report, 1899.

28/ 348 U.S. 272 (1995).

29/ And the United States Government continues to exploit the doctrine to defeat Indian claims. For example, the Tee-Hit-Ton decision was the basis for the decision of the United States Court of Federal Claims in Karuk Tribe of California, et al. v. United States (6 August 1998).

30/ The Alaska Native Claims Settlement Act and its consequences are discussed in full detail in Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission, 1985. Commissioner Berger presented the report to the thirteenth session of the Working Group on Indigenous Populations in 1995, on behalf of the Inuit Circumpolar Conference, the non-governmental organization which sponsored the Commission project.

31/ St. Catherines Milling Co. v. Queen, (1888) 14 App. Cas. 46; 2 C.N.L.C. 541; 58 L.J.P.C. 54; 60 L.T. 197; 5 T.L.R. 125, affirming 13 S.C.R. 577.

32/ Michael Dodson, op. cit.

33/ "Aboriginal and Torres Strait Islander Peoples and Australia's obligations under the United Nations Convention on the Elimination of all Forms of Racial Discrimination", a report submitted by the Aboriginal and Torres Strait Islander Commission to the United Nations Committee on the Elimination of Racial Discrimination, (February, 1999) 4.1.1.

34/ Committee on the Elimination of Racial Discrimination, Decision (2) 54 on Australia, 18 March 1999 (CERD/C/54/Misc.40/Rev.2, para. 7). "Validation" refers to validation of certain non-indigenous titles; the consequence of validation is the arbitrary extinguishment or impairment of affected native title and the loss of an opportunity to negotiate. "Confirmation of extinguishment" provisions refer to past acts of extinguishment. A range of previously issued titles are deemed by the Act to extinguish native title permanently, whether or not such titles extinguish title at common law. "Primary production upgrade" provisions permit pastoral lease holders to apply to upgrade their rights to permit a broad range of higher intensity "primary production activities" without requirements of consultation or negotiation with affected native title holders. The restrictions on the right of native title holders to negotiate mean that States and Territories are entitled to establish regimes for the grant of interests to mining companies and other developers on terms significantly less favourable to native title holders than before the amendments.

35/ Roque Roldán Ortega, "Notes on the legal status and recognition of indigenous land rights in the Amazonian countries", Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, op. cit. See also Stavenhagen, op. cit.

36/ Maria Luisa Acosta "The State and indigenous lands in the Autonomous Regions: The case of the Mayagna community of Awas Tingni", Indigenous Affairs, No. 4, December 1998, p. 35.

37/ Comissão Pro Yanomami Update, No. 101, February 1999.

38/ Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil, 1997.

39/ Comissão Pro Yanomami Update No. 101, February 1999; Conselho Indigenista Missionário - CIMI, Newsletter Nos. 354, 356.

40/ Communication from Manju Yakthumba, Chairman, Kirat Yakthung Chumlung, Katmandu, Nepal to Mr. John Pace, 5 January 1998.

41/ See report of the Working Group on Indigenous Populations on its seventh session (E/CN.4/Sub.2/1989/36).

42/ Newton, "Indian claims in the courts of the conqueror", 41 American University Law Review, vol. 41, No. 753, 1992; Barsh, "Indian claims policy in the United States", North Dakota Law Review, vol. 58, No. 7, 1982; Orlando, "Aboriginal title claims in the Indian Claims Commission: United States v. Dann and its due process implications", Environmental Affairs, vol. 13, No. 241, 1986.

43/ See for example, S. Tullberg, R. Coulter and C. Berkey, Indian Law Resource Center, "Violations of the human rights of the Sioux Nation, the Six Nations Iroquois Confederacy, the Western Shoshone Nation and the Hopi Nation by the United States of America", a complaint communicated to the Commission on Human Rights under the confidential "1503" procedure on 12 March 1980; Petition of Mary and Carrie Dann and the Dann Band of the Western Shoshone Nation to the Inter-American Commission on Human Rights, 3 April 1993.

44/ Petition of Mary and Carrie Dann on behalf of themselves and the Dann Band of the Western Shoshone Nation against the United States to the Inter-American Commission on Human Rights (1993).

45/ Response of the United States (9 September 1993).

46/ Letter from David J. Padilla, Assistant Executive Secretary of the Inter-American Commission on Human Rights, to Steven M. Tullberg, Indian Law Resource Center (10 March 1998).

47/ The Government of New Zealand submitted comments on the preliminary working paper stating, among other things, that such anger is expressed by very small groups, and pointing out that there is rarely complete support for a settlement from all involved. Letter from Deborah Geels, First Secretary, Permanent Mission of New Zealand to the United Nations Office at Geneva, addressed to the High Commissioner for Human Rights, 25 June 1998.

48/ Alan Thein Durning, "Guardians of the land: indigenous peoples and the health of the Earth", Worldwatch Paper 112 (December 1992) p. 26, citing Sahabat Alam Malaysia, "Native customary rights in Sarawak", Cultural Survival Quarterly, vol. 10, No. 2 (1987). In 1998, the Malaysian Court of Appeal in

Adong bin Kuwau v. State of Johor upheld a trial judgement which awarded compensation to the Jakun tribe for the loss of 53,273 acres of ancestral lands in the southern State of Johor.

49/ Durning, op. cit., p. 26.

50/ General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Permanent sovereignty over natural resources".

51/ General Assembly resolution 626 (VII) of 21 December 1952, entitled "Right to exploit freely natural wealth and resources".

52/ See, for example, the report of the Working Group on Indigenous Populations on its seventh session (E/CN.4/Sub.2/1989/36). In regard to hydroelectric development and the indigenous peoples of the Chittagong Hill Tracts, see the report of the Chittagong Hill Tracts Commission, May 1991. See also Rajkumari Chandra Kalindi Roy, Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh (Norwegian Agency for Development Corporation (NORAD), 1996).

53/ Reports of the Working Group on Indigenous Populations (E/CN.4/Sub.2/1989/36; E/CN.4/Sub.2/1993/29).

54/ For example, one indigenous organization in Peru submitted a communication on the adverse effects of commercialization of the Amazon region on the indigenous communities and the environment, particularly the problems of mining, oil development, road building and deforestation. Communication on the situation of indigenous peoples and their lands and territories in Amazonian Peru, Mr. Miquea Mishari Mofat, Central de Comunidades Nativas de la Selva Central, Peru, 15 April 1998. In a communication of 5 April 1998, Chief Teobaldo Melgar of the Yuracare people, and Bernardo Toranzo C., "Proyecto Munay", Bolivia, point out that this indigenous people has been relocated from its lands and that the discovery of oil on those lands has made it more difficult to seek their recovery. Nevertheless, the Yuracare people hope that they will be able to return to their territories in order to maintain their traditions.

55/ The Government of Canada reports in its submission of 27 May 1998 to the Special Rapporteur that settlements have been reached with groups such as the Mushuau Innu of Davis Inlet.

56/ Thomas R. Berger, Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992, Douglas & McIntyre, Ltd., 1991, p. 99.

57/ The Government of Canada reports in its submission of 27 May 1998 to the Special Rapporteur that the Government now does not believe that lands "transferred to Aboriginal people through land claims settlements should continue to be held and managed by the Government of Canada for First Nations, but that First Nations should own and control these lands themselves".

58/ See, for example, Ball, "Constitution, courts, Indian tribes", 1987 A.B.F. Res. J. 1, 63 (1987); Newton, "Enforcing the Federal-Indian trust relationship after Mitchell", Catholic University Law Review, vol. 31, No. 635, 1982.

59/ This case is discussed in Willheim, op. cit.

60/ See Durie and Orr, "The role of the Waitangi Tribunal and the development of a bicultural jurisprudence", 14 New Zealand Universities Law Review, vol. 14, No. 62, 1990.

61/ R. Plant, "Addressing indigenous land rights and claims: the role of international technical assistance", paper prepared for the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims (E/CN.4/Sub.2/AC.4/1996/6/Add.1).

62/ With reference to other countries in the Amazon region, see Roldán, op. cit. In regard to recent legislation in Chile, see Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims (E/CN.4/Sub.2/AC.4/1996/6).

63/ The New York Times reported on 20 March 1997 that the Government of Argentina had restored ownership of 308,900 acres of ancestral lands to the Collas Indians.

64/ Gro Bruntdland, Our Common Future, Oxford University Press, 1987.

## Annex

## RELEVANT STANDARDS AND MATERIALS CONCERNING INDIGENOUS LANDS AND RESOURCES

The following compilation of standards and materials is comprised of the most relevant portions of various legal instruments, draft legal instruments and other relevant materials. It contains only the main or most important legal materials that pertain to indigenous peoples and their relationships to land, territories and resources. The purpose of this compilation is to facilitate understanding of current international standards and of the draft principles contained in the draft United Nations declaration on the rights of indigenous peoples and the proposed Inter-American Declaration on the Rights of Indigenous Peoples.

### Universal Declaration of Human Rights

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

### International Convention on the Elimination of All Forms of Racial Discrimination

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(v) The right to own property alone as well as in association with others;

...

## Committee on the Elimination of Racial Discrimination

### General Recommendation XXIII (51) on the rights of indigenous peoples, adopted at the Committee's 1235th meeting, on 18 August 1997

1. In the practice of the Committee on the Elimination of Racial Discrimination, in particular in the examination of reports of States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the situation of indigenous peoples has always been a matter of close attention and concern. In this respect the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.

2. The Committee, noting that the General Assembly proclaimed the International Decade of the World's Indigenous People commencing on 10 December 1994, reaffirms that the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to indigenous peoples.

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.

4. The Committee calls in particular upon States parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;

(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use

their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

6. The Committee further calls upon States parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention.

International Covenant on Civil and Political Rights

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Human Rights Committee

General Comment 23, Article 27 (fiftieth session, 1994)

...

3.2 The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

...

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

## International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)

### Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

### Article 7

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

### Article 13

1. In applying the provisions of this Part of the Convention Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

### Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, Governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and Governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

(a) The provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) The provision of the means required to promote the development of the lands which these peoples already possess.

Agenda 21

Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992
(A/CONF.151/26 (vol. III))

Chapter 26, Recognizing and strengthening the role of indigenous people and their communities

...

Basis for action

26.1 Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement

environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

26.2 Some of the goals inherent in the objectives and activities of this programme area are already contained in such international legal instruments as the ILO Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on indigenous rights, being prepared by the United Nations Working Group on Indigenous Populations. The International Year of the World's Indigenous People (1993), proclaimed by the General Assembly in its resolution 45/164 of 18 December 1990, presents a timely opportunity to mobilize further international technical and financial cooperation.

Objectives

26.3 In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

(a) Establishment of a process to empower indigenous people and their communities through measures that include:

(i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;

(ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;

(iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;

(iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;

(v) Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;

(vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;

(vii) Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;

(b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;

(c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

Activities

26.4 Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:

(a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;

(b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.

World Bank Operational Directive 4.20 (September 1991)

(Note: The World Bank is in the process of revising Operational Directive 4.20)

Contents

15. The development plan should be prepared in tandem with the preparation of the main investment. In many cases, proper protection of the rights of indigenous people will require the implementation of special project components that may lie outside the primary project's objectives. These components can include activities related to health and nutrition, productive infrastructure, linguistic and cultural preservation, entitlement to natural resources, and education. The project component for indigenous peoples development should include the following elements, as needed:

(a) Legal Framework ... (ii) the ability of such groups to obtain access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.

...

(c) Land Tenure. When local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the State and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples. These steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles.

Preparation

17. If it is agreed in the IEPS (Initial Executive Project Summary) meeting that special action is needed, the indigenous peoples development plan or project component should be developed during project preparation. As necessary, the Bank should assist the borrower in preparing terms of reference and should provide specialized technical assistance (see para. 12). Early involvement of anthropologists and local NGOs with expertise in matters related to indigenous peoples is a useful way to identify mechanisms for effective participation and local development opportunities. In a project that involves the land rights of indigenous peoples, the Bank should work with the borrower to clarify the steps needed for putting land tenure on a regular footing as early as possible, since land disputes frequently lead to delays in executing measures that are contingent on proper land titles (see para. 15 (c)).

United Nations draft declaration on the rights of indigenous peoples

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the

right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, are preserved, respected and protected.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

## Proposed Inter-American declaration on the rights of indigenous peoples

Approved by the Inter-American Commission on Human Rights on 26 February 1997

Article VII. Right to cultural integrity

1. Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage, which are important both for their survival as well as for the identity of their members.

2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favourable than the standard of international law.

3. The States shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.

Right to environmental protection

Article 13

1. Indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.

2. Indigenous peoples have the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it.

3. Indigenous peoples shall have the right to conserve, restore and protect their environment, and the productive capacity of their lands, territories and resources.

4. Indigenous peoples have the right to participate fully in formulating, planning, managing and applying governmental programmes of conservation of their lands, territories and resources.

5. Indigenous peoples have the right to assistance from their States for purposes of environmental protection, and may receive assistance from international organizations.

6. The States shall prohibit and punish, and shall impede jointly with the indigenous peoples, the introduction, abandonment, or deposit of radioactive materials or residues, toxic substances and garbage in contravention of legal provisions; as well as the production, introduction, transportation, possession or use of chemical, biological and nuclear weapons in indigenous areas.

7. When a State declares an indigenous territory as protected area, any lands, territories and resources under potential or actual claim by indigenous peoples, conservation areas shall not be subject to any natural resource development without the informed consent and participation of the peoples concerned.

Traditional forms of ownership and cultural survival. Rights to land, territories and resources

Article 18

1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

3. (i) Subject to 3.ii, where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the

titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.

(ii) Such titles may only be changed by mutual consent between the State and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.

(iii) Nothing in 3.i shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.

4. Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.

5. In the event that ownership of the minerals or resources of the subsoil pertains to the State or that the State has rights over other resources on the lands, the Governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any programme for planning, prospecting or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis not less favourable than the standard of international law for any loss which they may sustain as a result of such activities.

6. Unless exceptional and justified circumstances so warrant in the public interest, the States shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples, but in all cases with prior compensation and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist.

7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to compensation on a basis not less favorable than the standard of international law.

8. The States shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons to take possession or make use of them. The States shall give maximum priority to the demarcation and recognition of properties and areas of indigenous use.

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